

SEP 05 2006

Greer v Yavapai County 04-16711

THOMAS, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent from the majority's analysis of Greer's excessive force and unlawful arrest claims. When granting judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). In resolving the motions for judgment as a matter of law in this case, inferences were drawn in favor of Officer Morgan, the *moving* party. Because I believe that factual issues prevent us from deciding this case as a matter of law, I would remand to the district court so that a jury may make the appropriate factual determinations.

The parties present fundamentally different accounts of the events leading up to the take-down. Greer tendered evidence that he gave Morgan permission to frisk him and to search his home for two minutes, and that Morgan obliged, but found nothing incriminating. Then, according to Greer, he told Morgan and the other officers to get out of his house, and tried to go back home. Morgan ordered Greer to get on the ground. When Greer refused, he was pepper sprayed and forcefully taken down. Morgan, however, denies that he asked Greer for permission to pat him down or to search his house. Rather, Morgan states that

Greer approached the officers in an agitated state, and that the officers took down Greer out of concern for their safety. Drawing the factual inferences in Greer's favor, as we are required to do, a reasonable jury could have found that Morgan acted unreasonably and recklessly in ordering Greer to the ground, and that his actions led the other officers to take down Greer in violation of Greer's constitutional rights. *See Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). Therefore, I conclude that genuine issues of material fact exist with respect to the excessive force claim.

Similarly, the existence of genuine issues of material fact preclude judgment as a matter of law on Greer's unlawful arrest claim. Whether Morgan had probable cause to arrest Greer for aggravated assault depends on whether Greer was aggressive towards Morgan, or simply trying to get back in his house. As explained above, Greer claims that Morgan attempted to detain him illegally after conducting a permissive search of his home and finding no incriminating evidence. Morgan, on the other hand, claims that Greer was detained because he became aggressive and abusive towards the officers. Taking the evidence in the light most favorable to Greer, I cannot, on this record, conclude as a matter of law that Morgan and the other officers acted in reasonable apprehension of imminent physical injury and that Morgan, therefore, acted reasonably in arresting Greer for

aggravated assault.

Because genuine issues of material fact exist on these claims, and because inferences were impermissibly drawn in favor of the moving party, I would reverse the grants of judgment as a matter of law on the claims of excessive force and unlawful arrest.